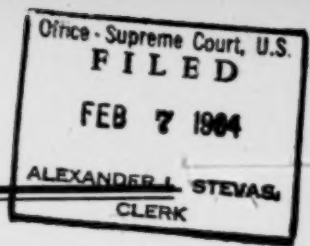


83-1306



NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ALTON CLARK BINGHAM,

Petitioner,

v.

NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

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Attorney for Petitioner:
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(i)

QUESTIONS PRESENTED FOR REVIEW

1. Is there a due process violation when an administrative body, here, the Board of Accountancy for the State of Nevada, entertained evidence and made findings which were at variance with the charges in the complaint?

2. Was there a violation of Petitioner's constitutional right to confront witnesses against him?

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IN THE
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ALTON CLARK BINGHAM,

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NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

ALTON CLARK BINGHAM petitions for a writ of certiorari to review the Judgment of the Order Dismissing Appeal filed by the Nevada Supreme Court in the instant case.

OPINION BELOW

On September 27, 1983, the Nevada Supreme Court entered an order dismissing an appeal affirming the Nevada State Board of Accountancy's decision to revoke Petitioner BINGHAM'S license to practice certified public accounting in the State of Nevada. A Petition for Rehearing was thereafter filed and a stay granted by the Nevada Supreme Court and the court did, on November 9, 1983, enter its order denying a rehearing. A copy of the Order Dismissing the Appeal is reproduced as Appendix "A" and a copy of the Order Denying the Rehearing is reproduced as Appendix "B". The Court Below held that the Petitioner's due process rights had not been violated even though the Board entertained evidence and made findings at variance with the charges in the complaint filed against him. The Court further held that even though a transcript of testimony made without the Petitioner being present had been introduced against him, the statements in the transcript were sufficiently corroborated by other evidence and thus, his confrontation rights had not been violated. The Court further held that hearsay statements, even though admissible in evidence, would not without corroboration support suspension of a license.

Other matters were also raised which are not the subject matter of the instant Petition.

JURISDICTION

Jurisdiction was originally initiated in the State of Nevada by an order to show cause why the license to practice accountancy should not be revoked against ALTON CLARK BINGHAM and jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1251 and §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in part:

“Nor shall any state deprive any person of life, liberty or property without the process of law nor deny to any person within its jurisdiction, equal protection of the law.”

The Sixth Amendment to the United States Constitution provides, in part:

“In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him. . . .”

STATEMENT OF THE CASE

On September 14, 1979, the Respondent, NEVADA STATE BOARD OF ACCOUNTANCY (hereinafter “The Board”) filed a complaint and order to show cause why Mr. BINGHAM’S certificate to practice as a Certified Public Accountant should not be revoked. From December 11, 1979 through and including February of 1980, five dif-

ferent hearings were held to receive evidentiary material against the Petitioner. The transcript of these proceedings stands more than 1,000 pages. On June 25, 1980, the Board rendered its findings of fact, conclusions of law and a decision which revoked ALTON CLARK BINGHAM'S license to practice as a Certified Public Accountant. Within the jurisdictional time limit, a petition for judicial review was thereafter filed.

On September 1, 1982, the District Court signed its Order affirming the order of the Nevada State Board of Accountancy and eventually an appeal was had before the Nevada Supreme Court which ultimately ordered dismissal of the appeal.

Factually, the instant case was initiated based upon the complaint and order to show cause why Mr. BINGHAM'S certificate to practice accountancy should not be revoked, said complaint having been filed on September 14, 1979. The specific charge which was listed on the complaint stated:

“Respondent did engage in the dishonorable, fraudulent and discreditable act of forging customers signatures on markers and converting said markers to monies for his own use while employed by or consulting the South Point Nevada Club.”

The complaint then stated that this action constituted “an act discreditable to the profession” and ordered Mr. BINGHAM to appear at a hearing to see whether his license should be revoked.

In response to the complaint for an order to show cause, Petitioner filed “an application for a more definite and detailed statement” pursuant to N.R.S §233B.121 (d) in order to ascertain the evidentiary support for the charge that

Mr. BINGHAM had "forged" markers and converted the monies to his own use. The Board thereafter filed a response which essentially attempted to alter the charge made in the complaint and order to show cause. Thus, instead of providing information to show that Mr. BINGHAM had actually forged certain markers, the Board used the response as a method to detail charges which were not mentioned in the complaint; for example, the Board stated:

"The Board does not at this time make any specific allegation as to whether Alton Clark Bingham forged customers' signatures but the Board does allege that Mr. Bingham was specifically involved in the misappropriation of various funds from the South Point Nevada Club."

Some nine months after the complaint had been issued and some four months after the hearings had been completed against Mr. BINGHAM, the Board issued its findings of facts, conclusions of law and a decision which revoked Mr. BINGHAM'S license to practice as a Certified Public Accountant. In the conclusions of law, many of them did not even remotely relate to the charge of Forgery, as outlined in the complaint. The Board, for example, concluded that Mr. BINGHAM had (a) accepted \$2,000.00 in exchange for a marker without the customer being present; (b) participated in the embezzlement of various funds from the South Point Nevada Club; (c) failed to exercise due diligence in the adherence to internal controls and Regulation 6 submission to the Gaming Control Board; (d) participated in the settlement of (an) outstanding marker; and (e) admitted forging signatures not on markers but on automobile leases, checks and other documents.

REASONS FOR GRANTING THE WRIT

I.

A DUE PROCESS VIOLATION OCCURRED WHERE AN ADMINISTRATIVE BODY, HERE, THE BOARD OF ACCOUNTANCY, ENTER-TAINED EVIDENCE AND MADE FINDINGS WHICH WERE MADE AT VARIANCE WITH THE CHARGES IN THE COMPLAINT.

As noted previously, the complaint and order to show cause specifically stated that ALTON CLARK BINGHAM had engaged in "the dishonorable . . . act of forging customers' signatures on markers, and converting said markers to monies for his own use. . . ". Petitioner raised a significant objection dealing with the notice of charges which were actually given in the complaint. Thus, Petitioner insisted that the only evidence which was admissible to support revocation of his license, was that evidence which would actually show that he had "forged" customers' signatures on markers and converted the money to his own use. As part of the objection, Petitioner's counsel noted that no amended complaint had ever been served upon Mr. BINGHAM detailing any other charge other than that initially listed in the complaint and order to show cause. Thus, Petitioner insisted that the Board could not enlarge upon the charges listed in the original complaint simply by providing discovery in the case. (Transcript, December 10, 1979, pp. 19-22, 38-39). As required by the Administrative Procedures Act (N.R.S. §233B.121 (1)), the Board chairman only noted the objection, and in effect, gave leeway to the Board counsel to introduce any evidence of wrongdoing whether related to the complaint or not.

Consequently, the Board heard testimony and made findings of fact which were totally unrelated to proof of forgery or embezzlement. For example, the Board found that Mr. BINGHAM had "failed to exercise due diligence and adherence to acceptable internal accounting controls"; "failed to adhere to the written and diagramatic system of control submitted to the Gaming Control Board"; engaged in transactions which "were without apparent regard to the Federal and State Tax Regulations on the exchange, or the possibility of depletion of company resources"; and "admitted he had forged the signature of Mr. Jenkins [the owner of the South Point Nevada Club] on automobile leases, ...".

Petitioner insists that the Board violated his right to due process by accepting evidence, and rendering findings of fact and conclusions of law which were unrelated to the initial charge.

Courts have long held that a party subjected to administrative revocation of a license is absolutely entitled to due process of law. The underpinnings of the due process requirement explicitly appear in the Administrative Procedures Act. Thus, N.R.S. § 233B.121(1) provides that "in a contested case", all parties shall be afforded an opportunity for hearing after reasonable notice." See also, N.R.S. § 628.400 *et seq.* [which statutes particularly set forth the due process requirements for revocation of an accountant's license.]

The Nevada Supreme Court has held that an administrative agency "cannot act without notice and a reasonable opportunity to be heard and must act within constitutional limits". *Checker, Inc. v. Public Serv. Comm'n.*, 84 Nev. 623, 634, 446 P.2d 981 (1968).

It has also been held that due process in the context of an administrative proceeding requires specific notice of *each issue* to be considered.

"Notice is rightfully considered to be a critical aspect of due process to be afforded in any administrative process.

The essentials of due process permit administrative regulation only by adherence to the fundamental principles of constitutional Government. The Legislature must appropriately prescribe standards of administrative action. The quasi judicial action thus prescribed, must faithfully observe the 'rediments of fair play'. ...

Appurtenant to the right to notice is the right to be fairly notified as to the issues to be considered: ... the procedure chosen by the Commission must of course give the parties fair notice of exactly what the Commission proposes to do, together with an opportunity to comment, to object, and to make written submissions; and the final order of the Commission must be based upon substantial evidence." *Grindstone Butte Mut. Canal v. Idaho Power Co.*, 574 P.2d 901, 907 (Ida., 1978).

The instant case is not unlike that of *State v. Guardian Funeral Home*, 429 P.2d 732, 736-737 (Okla., 1967). In *Guardian, supra.*, an administrative board revoked the license of a funeral home which had engaged in conduct in violating Oklahoma statutes. The original charge levied in the complaint related to the funeral home entering into contracts for pre-arranged funeral services or plans. However, the Board heard evidence and rendered findings which concluded that the funeral home was guilty of improperly soliciting business. The Oklahoma Supreme Court held that this was *prejudicial error*.

"This was not set forth as a charge in the complaint and the notice to the funeral home did not appear in the

original order. It was not an issue in the hearing before the Board. The funeral home was not put on notice that it was charged with this offense. . . .

The rule that the pleading and proof must conform is relaxed in administrative proceedings. *However, while the scope of a hearing should not be arbitrarily limited, to those raised by the pleadings. A hearing should be confined to the points at issue, so as to insure the persons affected full opportunity to be heard on any matter before a ruling thereon is made.*" (Emphasis added.)

In the instant case, it is glaringly obvious that the Board heard evidence, and rendered findings which were in complete variance with the original charge. Moreover, as will be subsequently demonstrated in this brief, there was no proof to even support some of the ancillary findings of fact made. Appellant submits that it was prejudicial error for the Board to conduct the hearings in this manner.

In *Stacey v. Board of Accountancy*, 553 P.2d 1074, 1076-1078 (Or., 1976), the Oregon State Board of Accountancy similarly revoked the Appellant's license to practice as a Certified Public Accountant. The initial complaint filed charged the accountant with gross negligence in his practice. However, the Board not only rendered findings which concluded that the accountant was grossly negligent, but they also concluded that he was dishonest in his practice.

The Court in reviewing the decision of the State Board first held that substantial evidence actually existed to support the finding of gross negligence. However, the Court also held that it was improper to make any findings concerning acts or dishonesty because the complaint did not charge the accountant with that activity specifically.

The Oregon Statute is almost identical with the provisions of N.R.S. §233B.121.

Thus, it can readily be seen that The Board acted improperly when it heard evidence and made findings unrelated to the charge of marker forgery and embezzlement. Had The Board desired to proffer additional charges against ALTON CLARK BINGHAM, then it would have been a simple matter to file an amended complaint before the hearing commenced. The instant case is in many respects the reverse of the *Stacey, supra.* case. That is here, The Board initially charged ALTON CLARK BINGHAM solely with being dishonest, but later found that he was negligent in his implementation of accounting procedures for the South Point Nevada Club. In the *Stacey case, supra.*, the Board charged gross negligence, and later added on a charge of dishonesty. The necessary conclusion then is that ALTON CLARK BINGHAM was not afforded due process of law. He was entitled to defend only those charges which were properly brought and cited in the complaint.

II.

THERE WAS A VIOLATION OF PETITIONER'S RIGHT TO CONFRONT WITNESSES AGAINST HIM.

One of the findings made by The Board was that Petitioner "admitted he forged the signature of Mr. Jenkins on automobile leases, checks and other documents". The Mr. Jenkins referred to in the finding was the former owner of the South Point Nevada Club at the time that ALTON CLARK BINGHAM worked there as Comptroller. In

effect, Mr. Jenkins was ALTON CLARK BINGHAM'S employer and the party which would have been aggrieved by any wrongful activity of the Petitioner. During the hearing, Mr. Jenkins was subpoenaed to testify by The Board against MR. BINGHAM. After being sworn, however, Mr. Jenkins curiously refused to answer any questions by invoking the Fifth Amendment to the United States Constitution. Faced with Mr. Jenkins' refusal to testify, counsel for The Board introduced, over objection, a transcript which was the product of an investigation by agents of the Nevada State Gaming Control Board. This transcript included statements of John Jenkins made outside the presence of ALTON CLARK BINGHAM or his counsel. In short, neither Petitioner nor his counsel were given the opportunity to confront or cross-examine Mr. Jenkins concerning his statements made to the State Gaming Control Board.

Despite Appellant's objections, counsel for The Board decided to mark the transcript as an exhibit and read portions from the transcript into the record. The statements which were read into the record indicated that at some point in time while Appellant was working for the South Point Nevada Club, he had admitted to John Jenkins that he had forged Jenkins' signature on contracts which related to the insurance on three leased cars. (*Ibid.* at 179). The Jenkins' transcript also indicated that Mr. BINGHAM had one time promised him that he would "never do it again." (*Ibid.*) It is from this "evidence" that The Board rendered the findings of fact to which Petitioner takes exception. Petitioner insists that this procedure not only violated his statutory and constitutional right to confront the witness against him, but also erroneously permitted The Board to make a finding based solely on hearsay proof.

By Statute, Petitioner is specifically given the right to con-

front witnesses against him, and cross-examine them concerning their allegations. Thus, N.R.S. § 628.410(4) mandates that "at any hearing, the accused may appear in person and by counsel, produce evidence and witnesses on his own behalf, *cross-examine witnesses*, and examine such evidence as may be produced against him." (Emphasis added.) The Administrative Procedures Act also requires The Board to permit an aggrieved party the right of cross-examination. Thus, N.R.S. § 233B.123(4) provides: "*Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though such matter was not covered in the direct examination, impeach any witness regardless of which party first called him to testify, and rebut the evidence against him.*" (Emphasis added.) Nevertheless, despite the statutory mandates, The Board permitted the introduction of transcript "testimony", and precluded Petitioner his right to cross-examine the "witness".

Putting aside the statutorily mandated confrontation right, Petitioner also submits that The Board was required to constitutionally permit cross-examination of adverse witnesses. The United States Supreme Court has made this abundantly clear in the case of *Goldberg v. Kelly*, 397 U.S. 254, 269, 25 L.Ed.2d 287, 300, 90 S.Ct. 1011 (1970). In *Goldberg, supra*, the Court discussed the requirements of due process in the context of administrative hearings, and held:

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses . . .

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual,

and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony of individuals whose memories might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative actions are under scrutiny."

See also, Hert v. J.J. Newberry Co., 587 P.2d 11, 12 (Mont., 1978) ["the right of cross-examination of adverse witnesses in administrative proceedings is constitutionally protected..] and *Employers Commercial Union v. Schoen*, 519 P.2d 819, 824 (Alaska, 1974) [wherein the Court held that the denial of a statutory right to cross-examine a doctor's report in an administrative proceeding could not "be regarded as harmless error."]

Counsel for The Board ignored Petitioner's confrontation objection, and instead justified his reading of the transcript pursuant to N.R.S. § 51.325. This Statute which delineates the hearsay exception of "former testimony" could not abrogate Petitioner's constitutional and statutory right to confront the witnesses. However, even assuming Petitioner did not have a statutory or constitutional right to cross-examine adverse witnesses, Petitioner submits that The Board's counsel was in error even under the "former testimony" exception.

N.R.S. §51.325 provides, in pertinent part:

“Testimony given as a witness at . . . a different proceeding [is not hearsay] if:

- (1) The declarant is unavailable as a witness; *and*
- (2) If the proceeding was different, *the party against whom the former testimony is offered was a party . . . and the issues are substantially the same.*” (Emphasis added.)

Petitioner submits that the requirement of sub-paragraph (2) was not met. Simply stated, Petitioner was not a party to the investigation made by the State Gaming Control Board. Moreover, he was not present when Mr. Jenkins gave his statement to the gaming agents. Consequently, the Jenkins’ transcript was purely hearsay—it did not qualify as “former testimony” under the Statute.

Courts have also held that it is prejudicial error to base a finding of fact *solely* on hearsay evidence. While Petitioner recognizes that hearsay is normally admissible in the context of administrative proceedings, hearsay evidence may never be the only basis to support a factual determination. *See e.g. Consolidated Edison Co. v. National Labor Relations Board*, 308 U.S. 197, 230, 59 S.Ct. 206, 83 L.Ed. 126, 140 (1938); *Steen v. Board of Civil Service*, 160 P.2d 816, 822 (CA., 1945); *cf. J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 428 (1969). Such an impermissible use of hearsay evidence itself constitutes a denial of due process.

In effect, a transcript “testified” against ALTON CLARK BINGHAM. This transcript was the only source of “evidence” which supported the finding of fact delineated in Paragraph 5(g). Petitioner, therefore, submits that he was denied his statutory and constitutional right to confront the principal adverse witness against him, and thus denied due process.

CONCLUSION

For the above indicated reasons, it is respectfully submitted that this Honorable Court grant a hearing on the Petition for Writ of Certiorari.

Respectfully submitted,

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Telephone: (702) 384-5563

Attorneys for Petitioner:
ALTON CLARK BINGHAM

CERTIFICATE OF SERVICE

It is hereby certified that three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, on the 6th day of February, 1984, to BRYAN McKAY, Attorney General, Heroes Memorial Building, Carson City, Nevada 89701, and MELVIN BRUNETTI, ESQ., 402 North Division Street, Carson City, Nevada 89701.

APPENDIX "A"**In the Supreme Court of the State of Nevada**

No. 14311)
ALTON CLARK BINGHAM,)
Appellant,)
vs.)
NEVADA STATE BOARD OF)
ACCOUNTANCY,)
Respondent.)

ORDER DISMISSING APPEAL

This is an appeal from an order affirming respondent Board's decision to revoke appellant Bingham's license to practice certified public accounting. Bingham raises multiple contentions on appeal.

Bingham first contends that the district court erred in finding that the Board did not deny his right to due process by entertaining evidence and making findings at variance with the charges in the complaint filed against him. Because the record reveals that Bingham received prior notice of the nature of the proceedings against him, we reject this contention. *See Nevada St. Apprenticeship v. Joint Appren.*, 94 Nev. 763, 587 P.2d 1315 (1978).

Bingham next contends that the admission into evidence of a certain transcript violated both his right to confront adverse witnesses and the hearsay rule. Because the

statements in the transcript were sufficiently corroborated by other evidence adduced at Bingham's hearing, this contention is without merit. *Cf. Biegler v. Nevada Real Est. div.*, 95 Nev. 691, 601 P.2d 419 (1979) (hearsay statements, though admissible in evidence, will not, *without corroboration*, support suspension of a license).

Finally Bingham contends that certain evidence was admitted in violation of the best evidence rule, and that the evidence was insufficient to support the Board's finding that he was guilty of embezzlement. We reject both contentions. *See* NRS 233B.123(1); 233B.140(5).

In light of the above determinations, we
ORDER this appeal dismissed.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

cc: Hon. Robert G. Legakes, District Judge
Goodman, Terry, Stein & Quintana
Allison, Brunetti, MacKenzie, Hartman,
Soumbeniotis & Russell
Loretta Bowman, Clerk

APPENDIX "B"

In the Supreme Court of the State of Nevada

No. 14311)
ALTON CLARK BINGHAM,)
Appellant,)
vs.)
NEVADA STATE BOARD OF)
ACCOUNTANCY,)
Respondent.)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).
It is so ORDERED.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

cc: Hon. Robert G. Legakes, District Judge
William B. Terry
Thomas J. Ray
Loretta Bowman, Clerk